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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 94-101

FCC MAIL SECTION

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In the Matter of	)	
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Further Forbearance from	)	GN Docket No. 94-33
Title II Regulation for Certain Types of	)	
Commercial Mobile Radio Service	)	
Providers	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 20, 1994; Released: May 4, 1994

Comment Date: June 27, 1994
Reply Comment Date: July 12, 1994

By the Commission:

I. INTRODUCTION

1. In the Second Report and Order in General Docket No. 93-252, the Commission classified all mobile radio services as either commercial mobile radio service (CMRS) or private mobile radio service (PMRS) and determined pursuant to the Omnibus Budget Reconciliation Act of 1993 to forbear from applying Sections 203, 204, 205, 211, 212 and 214 of Title II of the Communications Act to any service classified as CMRS.[1] We determined that the remaining sections of Title II should be enforced with respect to CMRS providers in order to promote competition or to protect consumers, and that this decision would not place an undue burden on any CMRS provider or class of providers. Nevertheless,

[1] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, Gen. Docket No. 93-252, FCC 94- 31(released March 7, 1994), ¶¶ 173-182,196, 272 (Second Report and Order); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) (Budget Act), to be codified at 47 U.S.C. §§ 303(n), 332; Communications Act of 1934 as amended (Communications Act), §§ 203, 204, 205, 211, 212, 214, 47 U.S.C. §§ 203, 204, 205, 211, 212, and 214. Section 332 defines CMRS as "any mobile service ... that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." Communications Act, § 332 (d)(1), 47 U.S.C. § 332 (d)(1).

we also announced that we would consider additional relief in a further rule making that would gather a more extensive record on the potential effect of the remaining sections of Title II on particular types of CMRS providers within each class of service.[2] The purpose of this Notice is to initiate that rule making.

2. In implementing revised Section 332, we concluded that CMRS includes the following former private radio services: specialized mobile radio (SMR) licensees that provide interconnected service, private carrier paging,[3] and all for-profit interconnected services offered by business radio service and 220-222 MHz band licensees. It also includes the following common carrier services: cellular service, all air-ground services, common carrier paging, all mobile telephone services and resellers of such services, offshore radio service, public coast stations and providers of mobile satellite service directly to end users.[4] We decided to treat both broadband and narrowband personal communications services (PCS) as CMRS on a presumptive basis, but to allow PCS systems to provide private PCS if they make a showing sufficient to overcome this presumption.[5]

3. The statute establishes a three-year transition period before certain private land mobile licensees who have been reclassified as CMRS become subject to regulations and statutory provisions generally applicable to CMRS providers.[6] Thus, providers of private land

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[2] Second Report and Order, ¶¶ 17, 272, 285 and n. 33. See also Separate Statement of Commissioner Andrew C. Barrett. We use the term "further forbearance" to refer to forbearance from application of these remaining sections of Title II. Section 332 (c) grants the Commission the authority to forbear from applying any sections of Title II, other than Sections 201, 202, and 208, to some or all CMRS. Second Report and Order, ¶¶ 86-87, 90-92, 95, 97; 59 Fed. Reg. 18493 (1994) (to be codified at 47 C.F.R. § 20.9).

[3] We excepted, however, private paging systems that service the licensee's internal communications needs but do not offer for-profit service to third-party customers. Second Report and Order, ¶¶ 97, 269.

[4] Second Report and Order, ¶¶ 102; 59 Fed. Reg. 18493 (1994)(to be codified at 47 C.F.R. § 20.9). We concluded that we would use our discretion to determine whether the provision of space segment capacity to other than end users by satellite licensees and other entities may be treated as common carriage. Second Report and Order, ¶ 270; 59 Fed. Reg. 18493 (to be codified at 47 C.F.R. § 20.9 (a)(10)). We also determined to treat as CMRS for-profit subsidiary communications services transmitted on subcarriers within the FM baseband signal that provide interconnected service. 59 Fed. Reg. 18493 (to be codified at 47 C.F.R. § 20.9 (a)(12)).

[5] 59 Fed. Reg. 18493 (to be codified at 47 C.F.R. § 20.9 (b)).

[6] Budget Act, § 6002(c); Communications Act, § 332 (c)(6), 47 U.S.C. § 332 (c)(6). See 59 Fed. Reg. 18493 (to be codified at 47 C.F.R. § 20.9(c)). The exception to this is Section 332 (c)(6), regarding foreign ownership, which becomes effective immediately. Implementation of Section 3 (n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, First Report and Order, Gen. Docket No. 93-252, 9 FCC Rcd 1056 (1994).

mobile service before August 10, 1993, (including any system expansions, modifications, or acquisitions of additional licenses in the same service, even if authorized after this date) and any private paging services using frequencies allocated as of January 1, 1993 that meet the definition of CMRS will not be subject to any provision of Title II before August 10, 1996.[7] CMRS providers not covered by this transition provision, including private land mobile service providers that first became licensees after August 10, 1993, however, are subject to these provisions upon the effective date of our rules implementing the CMRS transition,[8] unless the Commission decides to further forbear.

4. The statute gives the Commission discretion to forbear from applying specific provisions of Title II to certain CMRS providers if a three-pronged test is met. Section 332 (c)(1)(A) authorizes the Commission to take forbearance actions if it determines that

> (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly discriminatory;
> (ii) enforcement of such provision is not necessary for the protection of consumers; and
> (iii) specifying such provision is consistent with the public interest.[9]

The legislative history of this provision indicates that the Commission may distinguish among types of CMRS providers in making this determination. For example, the Conference Report states that "[d]ifferential regulation of commercial mobile services is permissible but is not required in order to fulfill the intent of this section."[10]

5. In the Second Report and Order, after analyzing the level of competition in the CMRS marketplace, we exercised our statutory authority to forbear from applying the most burdensome provisions of Title II common carriage regulation to CMRS.[11] We stated, however, that we would seek to avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and the national economy would ultimately benefit from

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[7] 59 Fed. Reg. 18493 (to be codified at 47 C.F.R. § 20.9).

[8] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Further Notice of Proposed Rule Making in Gen. Docket No. 93-252 (adopted April 20, 1994) (Further Notice).

[9] Communications Act, § 332 (c)(1)(A), 47 U.S.C. § 332 (c)(1)(A).

[10] H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993)(Conference Report). See also Communications Act, § 332 (c)(1)(A), 47 U.S.C. § 332 (c)(1)(A).

[11] Second Report and Order, ¶¶ 24, 135-54, 162-63, 173-182.

such a course.[12] After considering the nature of the statutory obligations that continue to apply to CMRS, and the character of particular CMRS providers, we seek comment here on whether, within particular services classified as CMRS, there may be types of providers that merit further forbearance from certain Title II requirements. Assuming that further forbearance in a particular case would not adversely affect rates or practices or harm consumers under the first two prongs of the test, we have tentatively identified two factors under the public interest test of the last prong that could serve to guide our determinations here. The first is whether there are differential costs of compliance with the remaining Title II sections that would make further forbearance appropriate for particular types of providers. The second is whether the public interest benefits from application of particular Title II provisions are less for certain types of CMRS providers. Thus, in applying the last prong of the statutory test and determining whether the public interest will be advanced by forbearing for particular types of CMRS providers, we ask commenters to identify (1) the benefits of applying the remaining Title II sections, (2) the costs of complying with the remaining Title II sections, and (3) whether the costs of compliance with any of the remaining sections of Title II outweigh the benefits. In addition, we ask, pursuant to Section 332 (c)(1)(C), whether further forbearance will enhance future CMRS competition from a diversity of entities.[13]

6. We ask commenters to demonstrate actual or projected cost of compliance with each provision of Title II that was not forborne, and the extent to which such costs vary across different types of providers. For example, if the costs of regulation are fixed, it could indicate that small CMRS providers are more likely than other types of CMRS providers to be burdened by the costs of regulation. We ask here whether there are instances where these additional costs outweigh the public interest benefits of applying the statutory provision in issue. We seek specific evidence on the magnitude of any such fixed costs. We also ask how we should define small CMRS for purposes of further forbearance.

II. APPLICATION OF FURTHER FORBEARANCE

7. As mentioned above, in the Second Report and Order we determined to forbear from applying Sections 203, 204, 205, 211, 212, and 214 to any CMRS service. It is important to state at the outset that we believe that the forbearance actions taken in the Second Report and Order are aimed at fostering vigorous and fair competition among CMRS providers. [14] For example, our decision to forbear from tariffing requirements in Sections 203, 204, and 205 significantly reduces the filing burdens placed upon such providers.[15]

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[12] Second Report and Order, ¶ 17.

[13] Communications Act, § 332 (c)(1)(C), 47 U.S.C. § 332 (c)(1)(C).

[14] Second Report and Order, ¶ 16.

[15] H. R. Rep. No. 103-111, 103d Cong. 1st Sess. 259-60 (1993)(House Report); Second Report and Order, ¶¶ 165-82.

Moreover, the statute substantially ameliorates the effect of changed regulatory status upon most formerly private carriers who have been reclassified as CMRS licensees by affording them a three-year transition period. Thus, our initial forbearance decision, together with the statutory three-year transition period to which most formerly private carriers are entitled, substantially reduced the potential burden of complying with new CMRS regulations. This proceeding is taking further steps to make sure that these decisions will have this intended effect.

8. In Section II of this Notice we ask commenters to address (1) how the statutory forbearance test and in particular the cost/benefit analysis we associate with the last prong of the test apply to each remaining Title II provision, (2) how forbearance from applying the provision of Title II would enhance future CMRS competition, (3) how Congressional intent underlying the Title II provision would be affected, (4) how forbearance for particular types of CMRS providers would comport with regulatory symmetry and (5) whether there are other factors or alternatives we should consider in classifying CMRS for further forbearance purposes. For each statutory provision that continues to apply to CMRS, we ask commenters to focus their analysis on whether further forbearance is warranted under the three-part test of Section 332.[16] We ask commenters to evaluate the extent to which regulatory concerns regarding rates, practices and consumer protection interests might be jeopardized by further forbearance for small providers. Moreover, we seek comment on how the Commission should compare the benefits of applying the remaining provisions of Title II to those the CMRS marketplace may realize through further forbearance. In connection with the third part of the test, -- the public interest standard -- we ask whether the costs to the provider in applying the remaining Title II provisions outweigh the benefits to the public to be gained in applying them. In addressing this test, we ask interested parties to identify whether there are types of CMRS providers for which application of the statutory provision in question will either pose undue costs or yield no benefits to the public. We also ask interested parties to comment on whether further forbearance from particular statutory provisions would enhance future CMRS competition from a diversity of entities and thus tend to justify a finding that forbearance served the public interest pursuant to 47 U.S.C. § 332(c)(1)(C).[17] We also ask parties, in addressing the application of the three-part test, to give special attention to how the Congressional intent underlying each of the Title II statutory provisions would be effectuated.

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[16] See supra para. 4.

[17] Section 332 (c)(1)(C) requires the Commission to report on the state of competition in "various" commercial mobile services, and requires the Commission, in making the determination of whether forbearance will further the public interest, to consider the impact of proposed regulation (or amendment) on competition. 47 U.S.C. § 332 (c)(1)(C). This is a separate question from whether existing competition justifies forbearance. Those commenting on using existing or future competition as a classification factor should also address the type of data they believe would establish competition, and provide any available data. Interested parties should also state what they believe the relevant market is, and what share of that market the service, class of provider, or provider in question has.

9. In addition, we ask interested parties to comment on how forbearance for particular types of CMRS providers would comport with the goal of regulatory symmetry underlying the recent amendments to Section 332,[18] bearing in mind that our forbearance authority permits differential regulation of CMRS providers.[19] Specifically, we seek comment on whether limiting further forbearance to only some CMRS providers would undermine regulatory symmetry and the regulatory scheme established in the Second Report and Order. Finally, we ask interested parties to suggest any factors or alternatives that we should consider in classifying CMRS for further forbearance purposes.

A. Section 210: Franks and Passes

10. As the Second Report and Order stated, Section 210 is unrelated to Commission or regulatory obligations.[20] Rather, it allows common carriers to issue franks and passes to their employees, and to provide the Government with free service in connection with preparation for national defense. Because this statute eases potential restrictions on carriers, we see no purpose in forbearing from applying it, nor do we view this provision as triggering any special concerns for small businesses. We seek comment on this tentative view.

B. Reservations of Commission Authority: Sections 213, 215, 218, 219, and 220

11. Characterizing the above provisions as primarily reservations of authority, the Second Report and Order found it unnecessary to forbear from applying these provisions to CMRS. We also decided, however, that we would take no immediate action to exercise our authority under these statutory sections.[21] Section 213 authorizes the Commission to make valuations of carrier property. Section 215 gives the Commission the authority to examine carrier activities and transactions. Section 218 authorizes the Commission to inquire into the management of a carrier and its owner. Section 219, inter alia, authorizes the Commission to require annual reports from carriers. Section 220 gives the Commission the discretion to prescribe the forms of accounts, records, and memoranda to be kept by carriers, as well as depreciation rates. In the absence of further rulemaking by the Commission, none of these provisions imposes affirmative obligations on CMRS providers.[22] Even though these

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[18] House Report at 259-60 (1993); Second Report and Order, ¶¶ 13-29.

[19] See supra para. 4.

[20] Second Report and Order, ¶ 193; Communications Act, § 210, 47 U.S.C. § 210.

[21] Second Report and Order, ¶¶ 192-193. However, we also conduct an annual review of the CMRS marketplace to determine whether the level of Title II regulation is appropriate. Communications Act § 332 (c)(1)(C), 47 U.S.C. § 332 (c)(1)(C).

[22] Moreover, forbearance would not prohibit the Commission from exercising its powers under these sections. The Commission would, however, have to hold a rule making on rescinding forbearance before using this authority.

provisions may have no immediate impact on CMRS, we seek comment on whether the potential for increased regulation (and any concomitant costs) might have an adverse economic impact on specific types of providers that is not in the public interest. In particular, we ask commenters to identify the costs of the potential for regulation-- intangible as well as financial -- with these sections of Title II, especially with respect to those costs that may apply uniquely to smaller providers. We also ask interested parties to comment on how further forbearance would affect consumers and the public interest under the three-part forbearance test.

C. Section 223: Obscene, Harassing, Indecent Communications

12. Under Section 223(a) it is a crime to make obscene or harassing telephone calls.[23] Pursuant to Section 223 (b)(1) and (2), it is also a crime, regardless of who initiated the call, to make an obscene telephone communication for commercial purposes, or to make an indecent telephone communication for commercial purposes that is available to (1) any person under 18 or (2) to any nonconsenting person regardless of age.[24] If the carrier collects payments for an adult information provider using the carrier's services, Section 223 (c)(1) forbids a common carrier, to the extent technically feasible, to permit access to an obscene or indecent communication from the telephone of any subscriber who has not previously requested such access.[25] This requirement, known as "reverse blocking,"or the blocking of all calls to specific adult information provider numbers, applies only if a carrier bills and collects fees for the adult information provider. As a technical matter, then, a CMRS provider subject to this obligation would have to program its switch (should it employ one) to accomplish this blocking. [26]

13. We tentatively reaffirm our general conclusion in the Second Report and Order

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[23] Communications Act, § 223 (a), 47 U.S.C. § 223 (a).

[24] Communications Act, § 223 (b)(1), (2), 47 U.S.C. § 223 (b)(1), (2). The statute also provides for civil penalties against those making obscene telephone communications or making indecent telephone communications available to minors.

[25] Communications Act, § 223 (c)(1), 47 U.S.C. § 223 (c)(1). "Adult information provider" is the term used in our decisions for "dial-a-porn" providers. See, e.g., Regulations Concerning Indecent Communications by Telephone, 5 FCC Rcd 4926 (1990).

[26] Under 47 C.F.R. § 64.201, an adult information provider has a defense to an indecency prosecution if the adult information provider has notified the common carrier that the provider is providing indecent material for commercial purposes, and (1) requires credit card payment before transmitting the message; or (2) requires an authorized access or identification code, which has been established by mail, before transmitting the message (with precautions, inter alia, that the code is not used by those under 18); or (3) makes the message available only to those with descramblers.

that Section 223 should continue to apply to CMRS.[27] In light of the important public interest in protecting minors embodied in Section 223, and the care taken to tailor our implementing regulations narrowly, we generally believe that Section 223 does not unduly burden any class of CMRS provider.[28] We observe that if a CMRS licensee decided to provide billing services (a non-common carrier service) on behalf of an adult information provider, it would do so voluntarily.[29] It is this voluntary business decision that would subject the CMRS provider to obligations to restrict access by minors and nonconsenting persons, including the reverse blocking requirement. Commenters are asked to address the impact of Section 223 on existing and projected CMRS offerings, and in particular, whether CMRS providers are likely to be involved in services that implicate Section 223.

D. Section 225: Telecommunications Relay Services

14. The Second Report and Order found that the record there afforded no basis for forbearing from Section 225 requirements for CMRS and added that the issue of contribution to the interstate fund for telecommunications relay service (TRS) was beyond the scope of that proceeding.[30] In this docket, we now seek further information on whether the obligation to provide TRS and to contribute to the interstate TRS Fund should apply to all types of CMRS providers.

15. Provision of TRS. Section 225, Title IV of the Americans with Disabilities Act,[31] requires all common carriers providing interstate or intrastate telephone voice transmission service to provide telecommunications services that enable persons with hearing and speech disabilities to communicate with hearing individuals.[32] To accomplish this, each common carrier must provide TRS throughout its service area. TRS permits persons with hearing and speech disabilities to communicate by telephone with persons who do not have such

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[27] Second Report and Order, ¶ 223.

[28] See, 135 Cong. Rec. S16177 (daily ed. Nov. 19, 1989)(Senator Helms); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989)(Sable)(finding compelling government interest, but rejecting previous version of statute as not sufficiently narrowly tailored to serve such interest); Dial Information Services v. Thornburgh, 938 F. 2d 1535, 1541 (2d Cir. 1991), cert. denied sub nom. Dial Information Services Corp. of N.Y. v. Barr, 112 S. Ct. 966 (1992); Information Providers Coalition v. FCC, 928 F.2d 866 (9th Cir. 1991).

[29] The carrier's provision of billing services on behalf of an adult information provider to the adult provider's customers is distinct from a carrier's billing the adult information provider itself for the communications services the carrier renders.

[30] Second Report and Order, ¶ 208.

[31] See Pub. L. No. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

[32] Communications Act, § 225, 47 U.S.C. § 225.

disabilities. TRS facilities are equipped with specialized equipment and staffed by communications assistants (CAs) who relay conversations between people who use text telephones and people who use traditional telephones.[33] Common carriers may select one of several methods of offering TRS, including: (1) individually (by setting up a TRS facility); (2) by designating someone else to provide it; (3) by a competitively selected vendor; or (4) in concert with other carriers.[34] Pursuant to Section 225 the Commission fashioned a comprehensive set of minimum standards, functional requirements, guidelines, and operational procedures for TRS.[35] Thus, if a CMRS licensee provided TRS itself, as opposed to using a third-party provider, the CMRS licensee would have to comply with these minimum mandatory requirements.

16. Section 225 provides for FCC certification of state TRS programs. States seeking certification must meet or exceed the mandatory operational, technical and functional standards set by the Commission. The intent is to provide uniform, nationwide access to telecommunications services to all Americans.[36] All states except Oklahoma received five-year FCC certifications. Providers of TRS in certified centers generally are selected by competitive bidding. Once certified, states enforce the provision of intrastate TRS; however, the FCC is required to assume jurisdiction over intrastate TRS complaints that have not been acted upon within 180 days.[37] Most carriers have elected to designate a TRS provider or to provide TRS in concert with other carriers.[38]

17. Heretofore, pursuant to Section 225, we have required provision of TRS by common carriers providing voice telephone transmission.[39] Section 332, however, makes Title II obligations applicable regardless of the previous common/private carrier dichotomy. For

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[33] The TRS staff and facility may vary in size according to the volume of calls handled.

[34] Communications Act, § 225 (c), 47 U.S.C. § 225 (c).

[35] Communications Act, § 225 (d)(1), 47 U.S.C. §225 (d)(1); 47 C.F.R. § 64.604.

[36] Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, 6 FCC Rcd 4657 (1991)(TRS I).

[37] Communications Act, § 225 (g)(2), 47 U.S.C. § 226 (g)(2).

[38] It appears, from data collected pursuant to the TRS certification process, that there are three interexchange carriers, six local telephone companies, and four other entities providing TRS services in a total of 33 TRS centers.

[39] Communications Act, § 225 (c), 47 U.S.C. § 225 (c); Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, Second Order on Reconsideration and Fourth Report and Order, CC Docket No. 90-571, FCC 93-463, 58 Fed. Reg. 53663 (Oct. 18, 1993), __ FCC Rcd __ , ¶ 6 (Sept. 29, 1993) (TRS IV); TRS I, 6 FCC Rcd at 4660. Satellite services not engaged in voice transmission and one-way paging services are not required to provide TRS.

purposes of further forbearance, are there CMRS providers whose market is so specialized, or their customer base or size of operation so small that applying TRS obligations to them would not appreciably advance the universal service objectives of Section 225? Would forbearance in such cases meet the test in Section 332? Parties are also asked to address whether the need for forbearance is reduced by providers' ability to designate a third party to provide TRS. We also seek comment on whether there are technical or operational limitations that would make compliance with our TRS technical standards difficult for a particular type of CMRS provider.[40] We ask whether interfacing with a third-party TRS provider would also pose technical difficulties, particularly for those private providers who will be reclassified as CMRS after new technical/operational rules become effective.[41]

18. TRS Fund. Pursuant to Section 225, intrastate TRS costs must be recovered from the intrastate jurisdiction. In a state certified TRS program, the state may permit a common carrier to recover the intrastate TRS costs in any manner approved by the state. In order to comply with the statutory mandate that interstate TRS costs be recovered from all interstate subscribers and to ensure that TRS costs are equitably distributed, the Commission adopted a shared-funding mechanism for interstate TRS cost recovery.[42] Under the Commission's shared-funding plan, providers of interstate telecommunications services contribute to a TRS fund, administered on an interim basis by the National Exchange Carrier Association (NECA). The amount of the yearly contribution is a percentage of the carrier's gross interstate revenues. The current factor is .00030.[43] Each carrier must contribute at least $100, even if its share under the actual computation would be less. Thus, carriers with interstate gross revenues of under $333,333, (using a .00030 factor) would have to contribute $100 a year. Each carrier must also file FCC Form 431, TRS Fund Worksheet, and update this form annually. If a carrier does not have to comply with our separations and accounting rules, in order to properly compute its interstate revenues, NECA provides them with a form which tracks the FCC's accounting rules. Payments to eligible TRS providers are based on interstate minutes of use.[44]

19. We have heretofore required all interstate service providers to contribute to the

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[40] 47 C.F.R § 64.604.

[41] See Further Notice supra.

[42] 47 U.S.C. § 225 (d)(3)(B). H. R. Conf. Rep. No. 101-596, 101st Cong., 2d Sess. 83 (1990). Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, 8 FCC Rcd 5300, 5302 (1993) (TRS III), appeal pending sub nom. Telocator, the Personal Communications Industry Ass'n v. FCC, No. 93-1711 (filed Oct. 25, 1993, D.C. Cir.).

[43] Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, DA 94-298, __ FCC Rcd __ (released April 5, 1994).

[44] TRS IV, ¶ 15; TRS III, 8 FCC Rcd at 5305.

TRS Fund.[45] Contributors must make monetary payments into the Fund, and comply with reporting and filing obligations, including conforming their accounts to the format NECA employs for determination of interstate revenues. However, in light of the small percentage used to calculate the contribution and the low minimum required ($100), we ask whether the burden from the funding and concomitant filing obligations are likely to be significant for any type of CMRS. We also reiterate that providers that do not themselves use TRS facilities are nevertheless required to contribute to the Fund.[46] The objective of requiring contributions is to ensure that TRS costs are widely and equitably distributed. We thus do not believe that the public interest would be furthered by exempting CMRS entirely because they do not use TRS facilities. We seek comment on this view.

E. Section 226: Operator Services

20. The Telephone Operator Consumer Services Improvement Act (TOCSIA), codified at Section 226, protects consumers making interstate operator service calls from phones available to the public or to transient users against unreasonably high rates and anti-competitive practices. It regulates two groups. The first consists of operator service providers (OSPs). These are providers of interstate telecommunications service from phones available to the public or to transient users that give automatic or live assistance for billing or completion to a caller.[47] The second group are aggregators, generally persons that, in the ordinary course of their operations, make telephones available to the public or to transient users of the premises and who use a provider of operator services. OSPs include long distance telephone companies as well as independent providers. Operator services include collect or person-to-person calls, calls billed to a third number, and calls billed to a calling card or credit card. These services may be provided by an automated device as well as by a live operator.[48]

21. OSPs. Prior to the passage of TOCSIA, some OSPs failed to identify themselves, charged rates higher than the consumer expected, charged for uncompleted calls,

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[45] Interstate service includes, but is not limited to, the interstate portion of: cellular telephone and paging, mobile radio, operator services, PCS, access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone, private line, telex, telegraph, video, satellite, international intraLATA, and resale services provided by common carriers. TRS IV, ¶ 15.

[46] TRS III, 8 FCC Rcd at 5302.

[47] 47 U.S.C. § 226 (a)(7). The definition excludes, inter alia, completion through the consumer's access code to an existing account of the consumer.

[48] S. Rep. No. 101-439, 101st Cong., 2d Sess. at 2 n.1 (1990) (TOCSIA Senate Report).

and engaged in "call splashing."[49] TOCSIA and our rules subject an OSP to various identification, disclosure and billing requirements, including the requirement that they "brand", i.e. , audibly identify themselves at the beginning of the call and before the consumer incurs any charges for the call.[50] OSPs may not bill for unanswered telephone calls in equal access areas having answer supervision and may not knowingly bill for unanswered telephone calls where equal access is not available.[51] An OSP may not engage in "call splashing," except when the consumer asks to be transferred and is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call.[52] OSPs must file informational tariffs.[53]

22. Aggregators. Prior to the passage of TOCSIA, the aggregator would sometimes restrict operator-assisted calling to an OSP that the aggregator, and not the consumer, chose. The aggregator would often be paid a commission by the OSP.[54] Pursuant to the statute and our rules, aggregators are required to identify and disclose certain information regarding the presubscribed OSP (i.e., the OSP to which operator services calls are routed if the caller does not dial an access code), and to disclose that rate information is available and that the consumer has the right to use an OSP of his or her choice. The aggregator must also ensure (1) that its telephones presubscribed to an OSP allow consumers to use 800 or 950 numbers to obtain access to the OSP of choice, and (2) according to an established implementation

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[49] Call splashing occurs when the OSP transfers a call to another carrier at a location different from the originating consumer and the second carrier cannot tell the originating location, resulting in an incorrect charge to the consumer which is not based on originating location. 47 C.F.R. § 64.708.

[50] Communications Act § 226 (b)(1)(A), 47 U.S.C. § 226 (b)(1)(A); 47 C.F.R.§ 64.703(a).

[51] 47 C.F.R. § 64.703 (a). "Equal access" refers to access equivalent to that which AT&T received from the local exchange companies after divestiture. It correlates to a consumer's ability to access an interexchange carrier by dialing "10XXX". In non-equal access areas, 10XXX access is not available and "0+" traffic defaults to AT&T. Often, equal access also correlates to the ability to obtain sophisticated features, such as "answer supervision", the signal that the called station or other customer premises equipment emits to tell the telephone company's billing equipment that a call has been answered and that billing should commence. If answer supervision is not available, an OSP may not be able to tell whether a call has been answered and may not be able to bill accurately. It also appears that answer supervision may not be available to all OSPs even in equal access areas. Although the statute refers only to equal access, we have clarified that OSPs in equal access areas that cannot subscribe to answer supervision will be held to a different standard regarding billing for unanswered calls. Policies and Rules Concerning Operator Services Providers, 7 FCC Rcd 3882, 3885-86 (1992).

[52] 47 C.F.R. § 64.703 (a).

[53] TOCSIA Senate Report at 4; H. R. Rep. No. 101-213, 101st Cong. 1st Sess. 2-3, 7 (1989) (TOCSIA House Report); 47 U.S.C. § 226 (b), (d)(4), (e), (h); 47 C.F.R. §§ 64.707.

[54] TOCSIA House Report 2-3.

schedule, that any of its presubscribed equipment allows the consumer to use equal access (10XXX) codes to access the customer's choice of OSP.[55]

23. The Second Report and Order found the record insufficient to justify a finding that forbearance for all CMRS would further the public interest. We seek here to compile a record on the more limited question of whether forbearance from Section 226 for particular classes of CMRS would be justified. Parties advocating forbearance for specific types of provider[56] from the aggregator or OSP rules should explain how such action would meet the three-part test for forbearance under Section 332. In particular, parties should address how the first and second prongs of the test, that rates be just and reasonable and that consumers be adequately protected, would be met.[57] In connection with the third prong, parties should address whether the statute imposes any costs that would be exceptionally difficult for certain types of CMRS provider to bear, and whether forbearance in such case would significantly diminish statutory protections for the public. In particular, we seek comment on whether such costs are likely to prove unduly burdensome for specific types of small CMRS providers.

F. Section 227: Unsolicited Telephone Calls and Facsimile Transmissions

24. Section 227, the Telephone Consumer Protection Act of 1991 (TCPA), restricts the use of automatic telephone dialing systems, artificial or prerecorded voice messages, and telephone facsimile machines to send unsolicited advertisements. TCPA prohibits autodialed and prerecorded voice message calls to emergency lines, health care facilities or similar establishments, and with certain exceptions, numbers (such as cellular numbers) for which the called party is charged for the call.[58]

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[55] 47 U.S.C. § 226 (c); 47 C.F.R. § 64.704 (a),(c). An aggregator must ensure that its charges for access codes (800, 950 or 10XXX) are no greater than charges than for calls using the presubscribed OSP. 47 C.F.R. § 64.705 (b).

[56] See generally Petition for a Declaratory Ruling that GTE Airfone, GTE Railfone, and GTE Mobilnet Are Not Subject to the Telephone Operator Consumer Services Improvement Act of 1990, 8 FCC Rcd 6171,6174-76 (Com.Car. Bur. 1993) (Airfone) recon. pending (applying TOCSIA to certain mobile services).

[57] Cf. Airfone, 8 FCC Rcd at 6174-75, n.32 (expressing serious concern over charges of aggregator that included long distance service charge, even though the customer might be billed separately by the long distance carrier).

[58] 47 U.S.C. § 227; 47 C.F.R. §§ 64.1200, 64.312. One district court ruling, now on appeal, found that the TCPA restrictions contained in 47 U.S.C. § 227 (b)(1)(B) on automatic voice calls to residential telephone subscribers are unconstitutional. Moser v. FCC, 826 F. Supp. 360 (D. Or. 1993), appeal pending sub nom. Moser v. FCC, Case No. 93-35686 (filed July 28, 1993 9th Cir.). Pending the outcome of that litigation, we are not seeking to enforce the statutory restriction or our rules governing automatic voice calls in any jurisdiction. All other portions of the TCPA and our rules are valid and are enforceable at this time, including the restrictions on sending unsolicited facsimiles. See

25. Current TCPA obligations primarily apply to the originator of the unwanted message, e.g., telemarketers.[59] Unless a CMRS provider also engages in telemarketing or sends unsolicited facsimiles or other unwanted communications, the statute generally does not apply to it.[60] The Second Report and Order declined to forbear from applying this section to CMRS, noting that most commenters found that this provision offered subscribers significant protections.[61] In so far as small CMRS providers act as originators of unsolicited voice or facsimile transmissions, we do not believe that forbearance for such providers would adequately protect consumers' privacy interests under the second prong of the Section 332 test.[62] Moreover, the decision to undertake telemarketing services would be a voluntary business judgment on the part of a CMRS provider. Such telemarketing is not a necessary part of what is generally regarded as CMRS.[63] We also see no public interest benefit under the third prong of the test in permitting CMRS providers, even small ones, to undertake such activities without complying with TCPA. We seek comment on these tentative views.

G. Section 228: Pay-Per-Call Services

26. Section 228 incorporates the Telephone Disclosure and Dispute Resolution Act (TDDRA). That Act governs pay-per-call services (also known as "audiotext" or "900" services). In general, these are information programs for which consumers are usually charged higher than normal transmission rates.[64] The definition is broad enough to cover data

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Destination Ventures v. FCC, Civ. No. 93-737 (D. Or. 1993)(Jan. 19, 1994).

[59] TCPA gave the Commission discretion to require a national "do not call" database, which would have imposed certain obligations on local exchange carriers. However, we decided that the costs of such a database would outweigh its benefits. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 8752, 8760 (1992), recon. pending.

[60] We observe that the issue of whether interexchange carriers who offer broadcast facsimile service should be subject to identification requirements and the restrictions on unsolicited facsimiles is pending before the Commission. See, e.g., Petition for Clarification or Reconsideration of U.S. West Communications, Inc., CC Docket No. 92-90 (filed Nov. 23, 1992). Our tentative views here are made without prejudice to the outcome of that pending proceeding. Broadcast facsimile service refers to a carrier's dissemination of facsimiles, via telephone communications links, to multiple parties on behalf of a customer. It may also include development of a list of recipients for the customer's facsimile.

[61] Second Report and Order, ¶ 212.

[62] See generally H. R. Rep. No. 102-317, 102d Cong. 1st Sess. 5, 24-25 (1991).

[63] CMRS entails mobile radio service that is for-profit, interconnected, and provided to the public or a substantial part thereof. Communications Act, § 332 (d)(1), 47 U.S.C. § 332 (d)(1).

[64] Section 228 defines "pay per call" services as (A) any service providing audio information or access to simultaneous voice conversation or which includes the provision of a product, the charges for which are assessed on the basis of completion of the call; (B) for which the caller pays a per-call or

services, the charges for which are assessed on the basis of the completion of the call.[65] The Act and our implementing regulations include the following obligations:

27. **Interexchange carriers.** Interexchange carriers, as the carriers who assign the information provider of pay-per-call service a 900 number, must require by contract or tariff that information providers comply with the TDDRA and terminate service if they know the provider is not in compliance. They must provide to federal and state agencies and to all interested persons, a list of the telephone numbers for each pay-per-call service carried, a description of each service and the costs of service and the pay-per-call provider's name, address and telephone number.[66] If they provide billing and collection on behalf of pay-per-call providers (as distinct from billing the pay-per-call provider itself for interexchange service), interexchange carriers must also establish a local toll-free number to answer questions and provide certain information to subscribers. They have obligations to disclose and disseminate certain information directly to consumers or by contract with a LEC, and to establish forgiveness, refund and credit procedures when TDDRA violations are found. An interexchange carrier not providing billing and collection must require that the pay-per-call provider or its billing agents have such procedures in place. [67]

28. **Local exchange carriers.** Local exchange carriers must offer subscribers, where technically feasible,[68] an option to block access to 900 services. They must also tariff the terms and conditions for such blocking.[69]

29. **Common Carriers in general.** (a) 800 Service. With certain exceptions, information service charges cannot be assessed against callers to 800 and other toll-free numbers. Common carriers must enforce this obligation by contract or tariff. (b) Collect Calls. Common carriers may not transmit collect information services that are either at a per-call or per-time-interval charge that is greater than, or in addition to, the charge for the transmission of the call, or have not been affirmatively accepted by the called party. (c)

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per-time interval charge greater than the charge for transmission; and which is accessed through a 900 number. 47 U.S.C. § 228 (i). Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, 8 FCC Rcd 6885, 6893 (1993)(TDDRA Order), recon. pending.

[65] 47 U.S.C. §228 (i)(1), (f)(3). TDDRA Order, 8 FCC Rcd at 6903. However, pursuant to the Act, the Commission has reported to Congress that those data services that are not assessed on the basis of completion of a call or data services provided pursuant to a presubscription or comparable arrangement should not be regulated.

[66] 58 Fed. Reg. 59265 (to be codified at 47 C.F.R. § 64.1509 (a)).

[67] 58 Fed. Reg. 59265 (to be codified at 47 C.F.R. § § 64.1511, 64.1509(b)).

[68] An example of technical infeasibility might be insufficient switching capacity.

[69] 58 Fed. Reg. 59265 (to be codified at 47 C.F.R. § 64.1508).

Payment. Common carriers are prohibited from disconnecting or interrupting service for failure to remit pay-per-call or similar service charges.[70] Common carriers may not recover the cost of complying with TDDRA requirements from ratepayers.[71]

30. The Second Report and Order found that enforcement of TDDRA would not impose any unreasonable burden on CMRS providers and would afford consumers an important protection.[72] We observe in this regard that most of the obligations imposed on carriers under TDDRA (e.g., responsibility for the information provider's compliance with the statute) affect interexchange carriers because they are the carriers who assign 900 numbers to a 900 service. CMRS do not have the ability to do this. Thus, they are not subject to the obligations imposed on interexchange carriers. We seek comment, however, on the extent to which the local exchange carrier obligation to permit subscribers to block access where technically feasible should apply to CMRS, and whether there are particular types of CMRS providers for which such an obligation would be particularly difficult. Would local exchange carriers provide blocking for customers of CMRS providers that interconnect with the public switched network? As stated above, many TDDRA obligations, such as restrictions on disconnection or on transmission of collect pay-per-call charges, are imposed on carriers who bill and collect for 900 services, which is not a common carrier service. We ask for comment on whether this type of voluntary business activity is not essential to provision of CMRS and hence, would not justify forbearance for any type of CMRS.[73]

31. In analyzing application of any of the above TDDRA obligations, we ask commenters to address the three parts of the Section 332 forbearance test. We ask whether the TDDRA provisions serve a necessary purpose in enforcing just, reasonable and nondiscriminatory rates. We also ask whether application of Section 228 is required to protect consumers. In particular, we ask whether Section 228 obligations would impose exceptional costs on certain types of CMRS and whether forbearance in such cases would significantly diminish statutory protections to the public. Parties should also address the effect forbearance would have on the TDDRA objectives of promoting the legitimate development of pay-per-call services and protecting consumers from fraudulent and deceptive practices.[74]

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[70] 58 Fed. Reg. 59265 (to be codified at 47 C.F.R. §§ 64.1503, 64.1505, 64.1507, 64.1510).

[71] 58 Fed. Reg. 59265 (to be codified at 47 C.F.R. § 64.1515). TDDRA Order, 8 FCC Rcd at 6902.

[72] Second Report and Order, ¶ 213.

[73] See supra para.13. We observe that if CMRS provide billing and collection, they are subject to FTC regulations on pay-per-call services, regardless of whether they are common carriers.

[74] See, e.g., H.R. Rep. No. 102-430, 102d Cong. 1st Sess. 2 (1992)

III. CMRS PROVIDERS MERITING FURTHER FORBEARANCE

32. In this section we consider alternative methodologies for defining CMRS providers potentially eligible for additional forbearance. First, we emphasize our determination in the Second Report and Order that application of Title II as set forth therein is not expected to create any undue burden on any CMRS provider, or on CMRS competition generally. [75] Our threshold question, therefore, is whether any further forbearance is merited at this time. As we have indicated, to the extent that regulatory obligations impose fixed costs, they would place relatively greater burdens on small providers who have less of a revenue base and other resources to support them. We also seek comment on whether there are technical or operational limitations inherent in the services these small businesses provide that may make application of certain of the statutory provisions in question not in the public interest. We also recognize the public interest in maintaining opportunities for small businesses and the role that further forbearance might play in reducing the cost of doing business for them.[76] We thus seek comment on whether the size of the provider may be a basis for defining CMRS eligibility for further forbearance. Finally, we seek comment on whether to consider an analysis of a CMRS provider's customer base as another possible factor in determining the appropriateness of further forebearance. Certain types of CMRS providers, particularly small providers, may serve predominantly business customers who require more advanced communications services and may have relatively greater bargaining power than CMRS customers that make personal use of the service. As a result, the differing needs of business and individual customers could affect our analysis of whether forbearance would reduce benefits to customers. In addition we ask whether there should be a distinction between medium to large business customers, and small businesses. We seek comment on these tentative views.

33. In the ensuing discussion, we seek comment on how to determine which type of provider should be considered "small" for purposes of further forbearance. We ask interested parties to comment on whether any one or any combination of the options we advance below should be applied. We also invite parties to suggest alternatives. In addition, we ask parties to comment on how we might draw on our experience in identifying small carriers in other contexts, e.g., the exemption to the cable-telco cross-ownership rule. [77] Finally, we ask that interested parties provide their views on how we might best implement and enforce any

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[75] Second Report and Order, ¶ 16.

[76] Cf. House Report at 254-55 (1993) (with reference to spectrum auction provisions which passed in same bill as mobile services reclassification, recognizing need to ensure that opportunities for small businesses are maintained).

[77] Communications Act, 47 U.S.C. § 613, 47 U.S.C. § 533; 47 C. F.R. §§ 63.54, 63.55, 63.58 (exemption for rural telephone companies in communities of under 2,500); Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 FCC Rcd 5781, 5856 (1992)(proposing to expand rural telco exemption to population of 10,000).

classification scheme. We seek comment on the advantages and disadvantages of the various options we propose with respect to implementation by both the Commission and licensees.[78]

A. Measurement Factors

34. One possible standard for size of business operation on which we invite interested parties to comment is the Small Business Administration (SBA) definition of small entity: an entity with a net worth not in excess of $6 million with average net income after Federal income taxes for the two preceding years not in excess of $2 million.[79] We relied on this standard to define small businesses entitled to preferences under the spectrum auction rules.[80] We believe that these criteria are appropriate for identifying entities entitled to preferred entry into new business ventures, as in the spectrum auction context. We tentatively find, however, that this standard is too generous for purposes of determining which CMRS providers are entitled to relief from remaining Title II obligations, many of which, as discussed above, are designed to protect consumers.[81] We thus ask whether we should employ a more modest income and net worth standard.[82] Those commenters that nevertheless advocate use of this approach should discuss how it would affect the different services comprising CMRS, providing as much data as possible on the number of providers in a particular service that would be eligible for further forbearance under this definition, and how it would affect consumer protection. We might also measure size and scope by a number of objective factors, such as average revenues per subscriber or percentage of interconnected traffic,[83]

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[78] For example, we suggest below as options the use of certain factors, such as number of customers, that are subject to change. We are particularly concerned that such an approach may prove administratively complex to administer and enforce and create burdensome reporting obligations for licensees. We ask interested parties to comment on these potential drawbacks, and on how they might be alleviated.

[79] 13 C.F.R. § 121.601.

[80] Implementation of Section 309 (j) of the Communications Act, Competitive Bidding, Second Report and Order, PP Docket No. 93-253, FCC- 94-61, ¶ 271 (released Apr. 20, 1994) (Spectrum Auction Order) .

[81] We found that the alternative standard used by the SBA for telecommunications companies, (that the applicant for SBA assistance, together with affiliates, has less than 1,500 employees) was too liberal for purposes of our spectrum auction rules. Spectrum Auction Order, ¶ 273. Similarly, we also tentatively conclude that it is too liberal to use for purposes of further forbearance for CMRS.

[82] Should we ultimately adopt a standard that differs form the SBA's definition noted above, we recognize that we may need to seek approval from the SBA Administrator. See 15 U.S.C. § 632 (a); 58 Fed. Reg. 44620 (Aug. 24, 1993).

[83] Studies show that in certain services, revenues per subscriber are substantially higher for interconnected as opposed to non-interconnected service. Merrill Lynch, "SMR in the United States: A

average number of customers[84] or for Part 90 licensees, number of mobile units, or average subscriber rate.[85] Interested parties should provide data to demonstrate whether providers within their suggested definition would find the costs of complying with the regulatory obligations outlined in Section II supra burdensome and how their recommended definition comports with the statutory factors set forth in Section 332 (c) governing forbearance.

35. We also seek comment on how, if we establish standards applicable to individual providers, should we treat affiliated corporations or operators of systems in more than one geographic area or providers who own multiple small systems.[86] In addition, we seek comment on whether we should attribute ownership of systems that are operated pursuant to an exclusive management contract, and thus not forbear when management contracts are in force.[87] We seek comment on the impact, if any, of industry mergers on application of a size standard. Should a small system's affiliation with a corporation that would yield greater vertical integration disqualify that system from further forbearance? Would a small mobile system necessarily enjoy benefits of scale and scope from an affiliation with, for example, a

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Window of Opportunity," (October 1993)(in 1992 the average service revenue per month for a dispatch SMR was $15, while the average revenue per month for an interconnected SMR was $50; average cellular revenues per subscriber for 1992 estimated at $68.68 (CTIA)- $74.08 (Merrill Lynch)). Thus, revenues per subscriber might be correlated to the percentage of interconnected traffic an operator handled. Although an operator's ability to handle interconnected calls subjects the operator to CMRS regulation, we might considering forbearing from full Title II regulation if the percentage of that operator's interconnected traffic was relatively small.

[84] Use of a customer number would seem to ignore systems that yield high subscriber profits. Parties advocating this option should submit data regarding the number of subscribers on systems in the services affected, as well as average revenues per subscriber.

[85] We might, for example, further forbear for operators charging less than half the current average cellular rate. Cellular companies now charge about $65 on average. "SMR in the United States: A Window of Opportunity," supra note 83. Such a standard would tend to provide protection for operators offering less sophisticated services. It would exclude from protection, however, high cost services that may not be particularly profitable.

[86] A related question is how much ownership constitutes ownership which would trigger such aggregation. Amendment of the Commission's Rules To Establish New Personal Communications Services, 8 FCC Rcd 7700, 7745-46 (1993); Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, Second Report and Order, 8 FCC Rcd 8565, 8591-92 (1993) (applying five percent attribution broadcast rule to cable).

[87] 47 C.F.R. §§ 90.401(a),(b); "Private Radio Bureau Reminds Licensees of Guidelines Concerning Operation of SMR Stations Under Management Contracts," Public Notice No. 1932 (Mar. 3, 1988); Applications of Motorola, Inc. for 800 MHz Specialized Mobile Radio Trunked Systems in California, New York, New Jersey, Maryland and Virginia, Order, File Nos. 507505, 507475, 507473, 507333, 507330, 507509, 508813, 508124, 508046, 507477, 507511 (July 30, 1985).

long distance provider? If so, would such a provider be ineligible for further forbearance?

36. Number of channels would provide an administratively straightforward means of identifying small CMRS entities. We ask for comment on whether number of channels is a workable and rational approach to measuring size of CMRS licensees. Commenters should specify specific types of CMRS providers licensed under Parts 22 and 90 of the Commission's Rules, and suggest numbers of channels that would identify small providers in each mobile radio service. In responding to these questions, we ask commenters to consider the likelihood that channels can be aggregated to form systems that would no longer be operated by a small provider, and how transition to a different level of forbearance would be effectuated. We also seek comment on how licensees conforming to this approach would be affected by the remaining Title II obligations discussed in Section II, and whether their users or competitors would be adversely affected by further forbearance.

37. An analysis of a CMRS provider's customer base, -- i.e., whether its customers subscribe to the service to meet their business communications requirements, as opposed to meeting a personal need for mobile communications service -- may be another possible factor in determining whether to apply further forbearance. To the extent that certain types of CMRS providers predominantly serve business customers -- such as traditional SMR and business radio services -- rather than individual customers, such business customers may have relatively greater bargaining power and information concerning their telecommunications options. In addition, we ask whether we should also distinguish between large and medium-sized and small business customers, on the assumption that small businesses may be more like individual consumers in their bargaining power over telecommunications services. Accordingly, we seek comment on (1) whether to apply an analysis of a CMRs provider's customer base and (2) what factors might contribute to our analysis.

B. Case-by-Case Determination

38. We might also extend further forbearance to particular CMRS providers on a case-by-case basis. Under this approach, providers desiring further forbearance from the remaining provisions of Title II that continue to apply could petition the Commission to forbear in individual circumstances. We believe that Section 332 (c)(1)(A) gives us authority to adopt such an approach, so long as the statutory test of forbearance is satisfied. Thus, petitioners would have to demonstrate that they meet the statutory test for forbearance, as implemented by the rules and policies we establish in this proceeding. We ask for comment on this approach, which we believe is consistent with our previous conclusion that the degree of forbearance adopted in the Second Report and Order should not be unduly burdensome for the vast majority of CMRS providers.

C. Implementation

39. If we exercise further forbearance with respect to individual providers, we seek

comment on how to enforce our standards efficiently, in terms of both identifying eligible entities and deterring evasive behavior. One option would be to amend our application forms to require certification of compliance with specific standards as part of our revised application form for the mobile services.[88] We could use random staff audits of licensees to determine whether they in fact qualify for further forbearance. A second alternative would be to impose affirmative reporting requirements on small providers. A third option would be to rely on complaints alleging violations of our further forbearance standards. We ask for comment on these and any alternative enforcement methods. We also seek comment on whether existing licensees should have to file a separate certification to be eligible for further forbearance.

IV. ADMINISTRATIVE MATTERS

40. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before June 27, 1994, and reply comments on or before July 12, 1994. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. For further information contact Gina Harrison or Susan McNeil, Private Radio Bureau, Land Mobile and Microwave Division, 202-632-7792 and 634-2443, respectively, or Peter Batacan, Common Carrier Bureau, Tariff Division, 202-632-6917.

41. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.203, and 1.206(a).

42. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel forAdvocacy of the Small Business Administration in accordance with paragraph 603(a) of the

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[88] Further Notice, § III.D.

Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ACT STATEMENT

I. Reason for Action. In an effort to avoid the imposition of unwarranted costs or other burdens upon carriers, the Second Report and Order determined that the Commission would initiate a rule making (the instant proceeding) to determine whether further forbearance from application of Title II provisions to CMRS was necessary.

II. Objectives of the Action. We seek here to determine whether to forbear further from imposition of Title II regulation on certain types of CMRS providers, particularly small providers, and how to define small CMRS providers.

III. Legal Basis. Communications Act, § 332, 47 U.S.C. § 332.

IV. Description, potential impact, and number of small entities affected. We do not have the data at this time to estimate the number of CMRS providers affected by this rule making, but we are herein proposing to reduce regulatory burdens for these providers.

V. Reporting, record keeping and other compliance requirements. The proposals under consideration in this Notice include the possibility of new reporting and record keeping requirements for small CMRS providers; however, one of the objectives of this proceeding is to minimize such burdens.

VI. Federal rules which overlap, duplicate or conflict with these rules. If adopted, the proposals here in would modify existing rules codified at 47 C.F.R. Part 20 and 47 C.F.R. §§ 1.728-1.734.

VII. Any significant alternatives minimizing the impact on small entities and consistent with stated objectives. This Notice proposes to reduce the administrative burdens and costs of compliance with Title II regulation on small CMRS providers.